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No. 92-1150

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHEMICAL MANUFACTURERS ASSOCIATION AND AMERICAN PETROLEUM INSTITUTE, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals should have deferred to the EPA's application of the land disposal prohibitions of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, to certain wastewaters that are regulated under the Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA).

2. Whether the court of appeals overstepped its proper role in dictating the content of the new rules that the EPA must develop in applying RCRA land disposal prohibitions to wastewaters regulated under the CWA and the SDWA.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-78a) is reported at 976 F.2d 2.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1992. A petition for rehearing was denied on January 11, 1993. The petition for a writ of certiorari was filed on January 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a court of appeals' decision invalidating certain aspects of the Environmental Protection Agency's regulations, promulgated under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, governing treatment and land disposal of hazardous wastes.

1. Congress enacted RCRA to address the increasingly serious environmental and health dangers arising from generation, management, and disposal of solid waste. Congress was particularly concerned with the safe management and disposal of hazardous waste. See H.R. Rep. No. 1491, 94th Cong., 2d Sess. 2, 3 (1976). It directed the EPA to identify solid wastes that are subject to regulation as hazardous wastes and to promulgate performance standards for the relevant industries, including the generators and transporters of hazardous wastes and the owners and operators of facilities engaged in the treatment, storage, and disposal of hazardous wastes. 42 U.S.C. 6921-6924. See *United Technologies Corp.* v. *EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987).

The EPA has published lists of specific hazardous wastes in which the agency has described the wastes and assigned a "hazard code" to each of them. 40 C.F.R. Pt. 261, Subpt. D. Those hazardous wastes are known as "listed wastes." The EPA has also identified four characteristics of hazardous wastes that can be objectively measured: ignitability, corrosivity, reactivity, and various kinds of toxicity. 40 C.F.R. Pt. 261, Subpt. C. Wastes sufficiently exhibiting any of those attributes are known as "characteristic wastes."

Congress comprehensively amended RCRA through the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221. In accordance with its

goal to reduce land disposal of hazardous wastes, Congress amended Section 3004 of RCRA to require the EPA to promulgate and phase in land disposal prohibitions with respect to all hazardous wastes. See 42 U.S.C. 6924(d), (e) and (g). It directed the EPA to promulgate land disposal prohibitions for characteristic wastes by May 8, 1990. 42 U.S.C. 6924(g)(4)(C). The amended Section 3004, however, provides exceptions to the land disposal prohibitions in two situations:

First, hazardous waste is not subject to the land disposal prohibitions if it has been treated in accordance with treatment standards established pursuant to Section 3004(m) of RCRA, which directs EPA to establish levels or methods for the treatment of hazardous wastes "which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized" (42 U.S.C. 6924(m)(1)). See 42 U.S.C. 6924(m)(2); see also 42 U.S.C. 6924(k) (defining "land disposal").

Second, the EPA may determine that a land disposal prohibition is not required if "it has been demonstrated * * * that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous." 42 U.S.C. 6924(d)(1) and (e)(1); see also 42 U.S.C. 6924(g)(5).

2. The EPA has promulgated and published land disposal prohibitions governing, among other things, characteristic wastes. 55 Fed. Reg. 22,520 (1990) (reproduced in part at Pet. App. 92a-125a). In promulgating those regulations, the EPA encountered many legally and technically complex issues. A central issue was the EPA's statutory authority to require full treatment of characteristic wastes. A characteristic waste may be partially treated so that it no longer meets the criteria

for characteristic waste, but it may nevertheless contain significant concentrations of toxic constituents. In that situation, eliminating the characteristic does not mean that the waste is safe or that "short-term and long-term threats to human health and the environment [have been] minimized." 42 U.S.C. 6924(m)(1). See Pet. App. 101a.

Industry parties, including petitioners in this Court, argued that RCRA does not allow the EPA to require full treatment to "minimize" threats once the generated waste no longer exhibits the characteristic. The treatment industry and some environmental groups argued that RCRA compels the EPA in all cases to require full treatment of characteristic wastes before land disposal, even after the waste no longer exhibits the characteristic, and that dilution does not constitute adequate treatment. The EPA rejected both extremes and concluded that once a characteristic waste is generated, the EPA has discretion to require full Section 3004(m) treatment, beyond merely removing the characteristic that led to its regulation as a hazardous waste. See Pet. App. 101a-102a.

The EPA determined, however, that full treatment should not be required in the case of certain characteristic wastes that are managed in wastewater treatment systems regulated under the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, or disposed of via underground injection regulated under the Safe Drinking Water Act (SDWA), 42 U.S.C. 300f *et seq.* The agency explained that RCRA is ambiguous with respect to application of the land disposal prohibitions to those wastes, which are no longer hazardous at the point of disposal, and that Section 1006(b)(1) of RCRA requires the agency to "integrate all provisions of [RCRA] for purposes of administration and enforcement and * * * avoid duplication, to the maximum extent practicable, with the appropriate provisions of the * * * [CWA and SDWA]." 42

U.S.C. 6905(b)(1). The EPA concluded that prohibiting dilution and imposing additional RCRA treatment for those particular wastewaters would lead to enormous and potentially counterproductive disruption of long-standing treatment practices. See Pet. App. 103a-113a.

3. Several parties filed timely petitions for review of various aspects of the EPA regulations. The industry petitioners renewed the arguments made in the administrative proceedings that the EPA lacked authority to require further treatment of characteristic wastes once the identifying characteristic is removed. The treatment industry and environmental groups continued to argue that the EPA was obligated to require full treatment of all characteristic wastes, rather than dilution before land disposal, regardless of the disruption caused thereby.

The court of appeals addressed those arguments in turn. Employing the two-step analysis of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984), the court rejected industry petitioners' argument that the EPA is foreclosed from requiring full treatment of characteristic wastes, even after the characteristic itself has been removed. Instead, the court found that the EPA's assertion of regulatory authority over characteristic wastes from the moment they are generated and its general requirement of full Section 3004(m) treatment before land disposal was "'based on a permissible construction of the statute.' *Chevron*, 467 U.S. at 843." Pet. App. 26a.

The court next addressed the arguments of the waste treatment industry and environmental groups that the EPA must require full treatment of characteristic wastes in all circumstances and that dilution did not constitute full treatment. The court rejected the EPA's conclusion that RCRA granted the agency discretion to determine that the land disposal prohibitions should not

apply to certain wastewaters that are already subject to regulation under the CWA and SDWA and are no longer hazardous at the point of disposal. Pet. App. 40a-55a. The court concluded that the treatment standards are "the core" of RCRA's hazardous waste management scheme and that Section 1006(b) of RCRA does not allow the CWA or SDWA to override RCRA. Pet. App. 44a-45a, 48a n.9.

Although the court rejected the EPA's interpretation of the statute, the court did acknowledge that RCRA requires some accommodation with the CWA's water treatment requirements. The court directed, however, that in the situation presented here

> whenever wastes are put in CWA surface impoundments before they have been treated pursuant to RCRA to reduce the toxicity of all hazardous constituents, these wastes must be so treated before exiting the CWA treatment facilities. In other words, CWA facilities handling characteristic wastes must remove the characteristic and decrease the toxicity of the waste's hazardous constituents *to the same degree* that treatment outside a CWA system would.

Pet. App. at 45a; see also *id.* at 44a, 48a n.9 (stating that nothing in RCRA allows the EPA to establish different treatment standards when wastewaters are treated in CWA systems instead of facilities operated solely to RCRA standards; RCRA's treatment standards, and not the lowest common denominator, must survive any attempt to integrate the statutes).

ARGUMENT

Petitioners challenge the court of appeals' rejection of the EPA's determination that RCRA does not require additional treatment of certain wastewaters that are treated in systems already regulated under the CWA or SDWA. The federal government promulgated the rele-

vant RCRA regulations, but it has decided against filing a petition for a writ of certiorari. We believe that the court of appeals should have deferred to the EPA's reasonable interpretation of RCRA's requirements, but that court's rejection of the EPA's interpretation does not warrant review by this Court.

1. Petitioners contend that "[t]he court of appeals largely disavowed the principles that govern judicial review of agency action under *Chevron*." Pet. App. 17; see *id.* at 15-23. The court of appeals, however, correctly articulated the general *Chevron* principles, and it explicitly based its decision on those principles. See, *e.g.*, Pet. App. 21a, 22a-23a, 26a, 28a, 29a, 44a-49a & n.9. This case does not present any question of general importance concerning the content of the *Chevron* doctrine, but simply involves the application of the doctrine to the particular circumstances of this case. One may question the correctness of the court of appeals' resolution of this particular RCRA dispute. But the federal government seeks this Court's review of such matters only in exceptional circumstances, when important federal interests are at stake, and this is not such a case.

2. Petitioners additionally contend that the court of appeals "improperly dictated the regulations that EPA must develop on remand." Pet. 23-25. It is, of course, well settled that a court's duty is to review the validity of agency regulations and that a court exceeds the bounds of that review if it takes the next step and dictates the nature of the rules an agency should adopt as replacements. See *Department of the Treasury* v. *FLRA*, 494 U.S. 922, 933 (1990); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); see also *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519 (1978).

The court of appeals arguably exceeded the proper bounds of review and foreclosed prematurely EPA's ex-

ercise of discretion on remand by stating that wastes treated in a CWA surface impoundment system must be treated to the same degree as if they were subject solely to RCRA's requirements. See Pet. App. 45a. The court of appeals' statements, however, can also be read to reflect that court's view of what RCRA itself requires. See *id.* at 44a n.7, 48a n.9. If the court of appeals is correct that RCRA dictates that level of treatment, then the court of appeals' decision does not in any practical sense curtail the EPA's regulatory discretion.

The court's decision is potentially troubling to the extent that it might be read to curtail the EPA's general authority under Section 1006(b) of RCRA, which directs the agency to "integrate all provisions of this chapter for purposes of administration and enforcement" to the extent it can be done "in a manner consistent with the goals and policies expressed in this chapter and in the other acts referred to in this subsection." 42 U.S.C. 6905(b). Environmental problems frequently implicate several of the EPA's statutory authorities, and the agency must have discretion to determine how best to integrate those overlapping authorities. The integration process often involves difficult technical and policy issues that should be determined in the first instance by the agency rather than a reviewing court. Nevertheless, we have concluded that the decision does not directly address the general scope of the EPA's integration authority. The court of appeals' statements concerning RCRA's integration provision apply, at most, to this particular rulemaking. They would not preclude the EPA from applying the integration provision in a more flexible manner in other regulatory contexts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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